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In the Supreme Court of the United States

OCTOBER TERM, 1979

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER

v.

JOHN MICHAEL WHYTE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ALAN I. HOROWITZ
Assistant to the Solicitor General

MERVYN HAMBURG
Attorney
Department of Justice
Washington, D.C. 20530

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On October 1, 1979, the Court invited the views of the Solicitor General concerning this case.

QUESTION PRESENTED

Whether federal agents conducting a controlled delivery of packages found to contain hashish during a Customs search violated the Fourth Amendment when, acting without a warrant, they retrieved the packages after they had been placed in a bookstore by a third party.

STATEMENT

Respondent was charged with unlawful transportation and importation of hashish, in violation of Section 11360(a) of the California Health and Safety Code. Prior

to trial, the California Superior Court for the County of Marin granted respondent's motions to suppress the hashish and dismiss the information. The California Court of Appeal affirmed (Pet. App. A-1 to A-11), and the Supreme Court of California denied a hearing (Pet. App. C). The State of California has filed a petition for a writ of certiorari.

The evidence adduced at a suppression hearing is summarized in the opinion of the Court of Appeal (Pet. App. A-1 to A-4). Six large bales of burlap were shipped from India to San Francisco. The shipping document listed respondent as both the shipper and the recipient of the bales, with the place of delivery being the "Asiatic Galleries, 335 San Anselmo Avenue, San Anselmo, California." Respondent rented space at that address (Pet. App. A-2).

On April 9, 1977, a specially trained dog began scratching at the bales as they sat in the foreign import section of the San Francisco Airport cargo shed. Two Customs officers opened one of the bales and found 30 ounces of hashish hidden inside. The six bales were then taken to the Customs Office for security (Pet. App. A-2).

On April 12, 1977, respondent, unaware of the Customs officers' discovery, arranged for a trucking company to deliver the bales to 335 San Anselmo Avenue on the following day. Respondent had earlier notified Carla Cunningham, a clerk at the Abraxas Book Store at that address, of the impending delivery of what he described as "art goods." On April 13, respondent stopped by the store and gave Cunningham a check with which to pay for the shipment. He instructed her to have the bales placed in front of the store, where he would pick them up later (Pet. App. A-2 to A-3).

An undercover agent of the Drug Enforcement Administration accompanied the delivery truck to the bookstore and helped deliver the bales. He accepted the check from Cunningham and had the bales placed on the sidewalk in front of the store. The store was kept under surveillance all day by federal agents and local police (Pet. App. A-3). On several occasions that afternoon respondent was observed in the vicinity of the bookstore, but he did not remove the bales (Pet. App. A-3 to A-4). At 4:30 p.m. respondent telephoned Cunningham to inform her that he did not yet have a truck with which to pick up the bales but that she could close the store and he would pick up the bales later (Pet. App. A-3). At about 5:45 p.m. another store clerk, stating that the bales were expensive, proceeded to drag them into the store (Pet. App. A-3). The federal agents and local police then entered the store, arrested Cunningham, and returned the bales to the sidewalk (Pet. App. A-3). The surveillance continued until 11:15 p.m., at which time the agents took the bales to the San Anselmo police station (Pet. App. A-4). The bales were found to contain more than 43 pounds of hashish (Pet. App. A-4).

The Court of Appeal held that the seized hashish was properly suppressed, although the precise basis for its holding is unclear. First, it stated that the Customs authority to seize the bales without a warrant did not extend to a seizure in San Anselmo four days later (Pet. App. A-8 to A-9). Second, it stated that even if that authority did continue as long as the bales were being delivered, a warrant was necessary once the bales were taken into the store (Pet. App. A-9 to A-11).

ARGUMENT

The decision of the Court of Appeal is somewhat ambiguous as to precisely what conduct it found to be prohibited by the Fourth Amendment in this case. Several events occurred between the entry of the bales into the country and their seizure in the bookstore. Four days passed until delivery, the bales were taken to San Anselmo and placed on the sidewalk, and a third party took possession of the bales and placed them in the bookstore. The opinion of the Court of Appeal does not specify at what point during these events the agents began to be required to obtain a warrant. Whatever its precise outlines, however, the court's holding that the evidence should have been suppressed is erroneous and in conflict with federal court of appeals decisions.

1. There is no doubt that the Customs agents acted legally in searching the burlap bale at the airport without a warrant. Customs officials are authorized by 19 U.S.C. 482 to search merchandise entering the country, and such a search does not require a warrant. See *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977); *Boyd* v. *United States*, 116 U.S. 616, 623 (1886). The Court of Appeal suggests (Pet. App. A-8 to A-9) that the officers did not retain their Customs authority to act without a warrant at the time that they reseized the bales. Apparently, this conclusion is based either on the distance from the entry into the country, both physical and temporal, or on the fact that the officers relinquished physical possession of the bales when they left them on the sidewalk. Neither of these factors supports the court's suggestion.

19 U.S.C. 482 authorizes Customs searches of imported merchandise "wherever found." Accordingly, several federal court of appeals decisions have approved the practice of permitting the delivery of imported goods

to take place under the control of Customs or other agents. In *Davis* v. *United States*, 272 F. 2d 149, 153 (7th Cir. 1959), the court stated that government agents were not required to seize contraband as soon as they discovered it, approving the agents' action in following a car known to contain marijuana from Texas to Illinois and then seizing the marijuana after it was transferred to another car. See also *Alexander* v. *United States*, 369 F. 2d 379 (9th Cir. 1966). Such seizures have been held to be permissible even when they are far removed in time and distance from the point at which the merchandise entered the country. See *United States* v. *Fogelman*, 586 F. 2d 337 (5th Cir. 1978) (254 miles and 20 hours from border crossing); *United States* v. *Martinez*, 481 F. 2d 214 (5th Cir. 1973) (150 miles and 6 days from border crossing).

The Customs authority does not end simply because physical possession is relinquished in the course of a controlled delivery. When a package is shipped from a foreign country to the United States, neither the sender nor the recipient has a legitimate expectation that the package will not be searched by the Customs Service. This lack of expectation of privacy persists as long as the package is in transit to its destination. Thus, in *United States* v. *King*, 517 F. 2d 350, 354 (5th Cir. 1975), a Customs agent was permitted to search mail at a post office in Birmingham, Alabama, just as he would have been entitled to search it when it first arrived in the United States at San Francisco. Until an expectation of privacy is restored, such as by delivery to the recipient's home (see *Chapman* v. *United States*, 443 F. 2d 917 (10th Cir. 1971)), no Fourth Amendment interest is infringed by the continued authority to conduct Customs searches.

The physical possession of the item is relevant in this context only in showing that the item being seized is the same item that entered the country earlier. See *Alexander* v. *United States*, *supra*, 369 F. 2d at 382. That was certainly the case here, because the bales were under constant surveillance from the time they were left on the sidewalk. Thus, the act of leaving the bales on the sidewalk did not end the officers' authority to retrieve them without a warrant.

As a practical matter, the bales remained within the control of the agents while they were on the sidewalk. The controlled delivery was simply a continuation of the original seizure at the border, and no new seizure would have occurred had the agents retrieved the bales from the sidewalk. See *United States* v. *DeBerry*, 487 F. 2d 448, 451 (2d Cir. 1973).

2. It is possible that the court is suggesting that the agents lost the right to seize the bales at the time the store clerk took possession of them to drag them into the store. However, there is no reason why the officers' freedom of action should have been further limited by that action. Although the clerk briefly took possession of the bales, he was not acting on behalf of respondent, and thus the bales were still in transit to respondent. No legitimate expectation of privacy in the bales was restored to respondent by the third party's unauthorized action. Accordingly, the agents retained their Customs authority to seize the bales.

Even aside from the Customs authority, the agents were entitled to reseize the bales as long as they remained in a public place. The agents knew for a fact, based on their search at the airport, that one of the bales contained contraband and had probable cause to believe that the other bales also did. Based on this probable

cause, they were entitled to seize the bales from a public place without a warrant. See *G. M. Leasing Corp.* v. *United States*, 429 U.S. 338, 350-351 (1977).

3. Finally, the court clearly held that the officers acted illegally in seizing the bales once they had been placed in the book store, regardless of whether they would have had a right to make a seizure when they were still on the sidewalk. The court ruled: "Once the bales of burlap were placed inside the book store, control by the Customs Service ended. In the absence of any emergency, any subsequent government intrusion without a warrant was unreasonable" (Pet. App. A-11). We disagree. The mere fact that the bales were moved into a bookstore without respondent's knowledge should not terminate the officers' authority to seize the bales, as they were still "in transit" to respondent and remained wholly intact in the form in which they had been imported. Had the goods been delivered to respondent and taken into his home or office, a warrant would have been required for the agents thereafter to enter and search the premises for the goods, but here no independent search of any private area occurred. Accordingly, the officers retained their authority to search the bales without a warrant. Moreover, apart from the Customs authority, the bookstore was a public place from which the bales could be seized without a warrant because the officers had probable cause. See *G. M. Leasing Corp.* v. *United States*, *supra*.

A second question is whether the officers were entitled to enter the bookstore without a warrant. Initially, it should be noted that respondent, who appears to have had no interest in the bookstore,[1] has no standing to raise the alleged violation of the Fourth Amendment rights of the owner of the bookstore. See, *e.g.*, *Rakas* v. *Illinois*, 439 U.S. 128 (1978). In any case, the entry into the store was proper. Certainly as long as the bookstore was open for business, the officers were entitled to enter, just like any other citizen. The court did not make any specifically find whether the bookstore was open or closed when the officers entered, but petitioner informs us that the record indicates that the door was unlocked and the officers entered just as the bookstore was closing. It would thus appear that the store was still a public area that the officers were entitled to enter without a warrant. No search of the bookstore, which might well have required a warrant, took place; the officers simply entered (seeing only that which was exposed to the view of any patron of the bookstore) and took the bales back to the sidewalk.

Even if the store was, in fact, closed before the officers' entry, we believe that a warrantless entry for the limited purpose of seizing the bales was justified in the circumstances of this case. The officers knew that one of the bales contained contraband and had probable cause to believe that the others did. During the time it would have taken the officers to get a warrant, the bales could have been dismantled inside the store and the contra-

[1]Although we have not examined the record, petitioner informs us that respondent rented space at the same address as the bookstore, but had no interest in the bookstore itself. The court, however, did state (Pet. App. A-9) that respondent rented space at the bookstore (but see Pet. 13).

band removed. This potential removal of evidence was an exigent circumstance that justified the entry of the officers into the store without a warrant. *United States* v. *Rubin*, 474 F. 2d 262 (3d Cir. 1973). See *United States* v. *Jeffers*, 342 U.S. 48, 52 (1951); *McDonald* v. *United States*, 335 U.S. 451, 455 (1948); *Johnson* v. *United States*, 333 U.S. 10, 15 (1948). Moreover, it does not appear that the necessity for a warrantless entry could reasonably have been avoided by the officers. They could not have gotten a warrant at any time prior to the seizure from the store because there was no probable cause to believe that the bales would be on the premises. See, *e.g.*, *United States* v. *Issod*, 508 F. 2d 990, 993 (7th Cir. 1974), cert. denied, 421 U.S. 916 (1975).

4. Although we believe that the decision of the Court of Appeal is thus in error on several grounds and defines altogether too restrictively the government's right to make customs searches and seizures away from the border, it does not follow that the decision would have a significant adverse impact upon the operations of the Customs Service. Since practices such as those utilized in this case have been approved by those federal courts that have considered the question, we perceive neither a legal nor a moral obligation to terminate the practices on the basis of a single decision of an intermediate state court.

Accordingly, we cannot ascribe such practical importance to this decision as to render it worthy of plenary review by this Court.[2] And while the decision conflicts

[2]The decision would have some effect on prosecutions brought by the Customs Service in the First Appellate District of California; because of the crowded docket of the federal courts, some prosecutions of offenses that violate both federal and state law are ordinarily brought in state court.

with those of federal appellate courts, it is not a decision of the highest court of California, and thus it is not clear that the conflict requires resolution by this Court. Finally, we perceive no substantial or controversial Fourth Amendment issue in the case that clearly justifies this Court's attention. What there is, in our view, is simply an erroneous decision misapplying relatively settled Fourth Amendment doctrine. Under the circumstances, it is our view that the Court should either deny certiorari or summarily reverse the judgment of the California court.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ALAN I. HOROWITZ
Assistant to the Solicitor General

MERVYN HAMBURG
Attorney

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